Supreme Court, U.S.
FILED
FEB 16 1972
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-1052

CHESTER McKINNEY, Ind. and d/b/a
PARIS BOOKSTALL,
and the Magazine "Blast Off Number 1",
the Magazine "Beavers, Vol. 4, No. 1",
the Magazine "The Special No. 3",
the Magazine "The Special No. 4",
the Magazine "Sumpin Different",
and the Magazine "Pleasure Partners,
Volume 1, Number 1",
Petitioners,

v.

THE STATE OF ALABAMA,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF ALABAMA**

ROBERT EUGENE SMITH, Esq.
Suite 507
102 W. Pennsylvania Avenue
Towson, Maryland, 21204
Counsel for Petitioners

Of Counsel:

D. FREEMAN HUTTON, Esq.
Suite 2005
1175 Peachtree Street, N.E.
Atlanta, Georgia, 30309
(404) 892-8890

FERRIS S. RITCHEY, Esq.
825 Frank Nelson Building
Birmingham, Alabama, 35203
(205) 252-2191

The Paul M. Harrod Company, Baltimore, Maryland 21234

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	4
Statement of the Case	4
How Federal Questions Are Presented	5
Reasons for Granting the Writ	7
Conclusion	29
Appendix A	1
Appendix B	9

TABLE OF AUTHORITIES

Cases

Aday v. United States, 388 U.S. 447 (1967)	11
Alberts v. California, ___ *** ___	8
Austin v. Kentucky, 386 U.S. 767 (1967)	10
Avasino v. New York, 388 U.S. 446 (1967)	11
Bloss v. Dykema, 398 U.S. 278 (1970)	11,29
Bloss v. Michigan, 402 U.S. 938 (1971)	11
Books, Inc. v. United States, 388 U.S. 449 (1967)	11
Burgin v. South Carolina, 404 U.S. 806 (1971)	11,29
Cain v. Kentucky, 397 U.S. 319 (1970)	11
Carlos v. New York, 396 U.S. 119 (1969)	11
Central Magazines Sales, Ltd. v. United States, 389 U.S. 50 (1967)	11
Chance v. California, 389 U.S. 89 (1967)	11
Childs v. Oregon, 401 U.S. 1006 (1971)	11
City of Phoenix v. Fine, 420 P.2d 26 (1966)	22
Cobert v. New York, 388 U.S. 443 (1967)	11
Commonwealth v. Dell Publications, Inc., 233 A.2d 840 (1967)	20
Conner v. City of Hammond, 389 U.S. 48 (1967)	11
Corinth Publications, Inc. v. Wesberry, 388 U.S. 448 (1967)	11

Page

Duggan v. Guild Theatre, Inc., et al, 258 A.2d 865 (1969). 14
Dunn v. Maryland State Board of Censors,
213 A.2d 751 (1965) 21
Felton v. City of Pensacola, 390 U.S. 340 (1968) 11
Friedman v. New York, 388 U.S. 441 (1967) 11
Gent v. Arkansas, 386 U.S. 767 (1967) 10
Giannini, 72 Cal. Rptr. 655 (1968) 12
Ginzburg v. United States, 383 U.S. 463 (1966) 6,8,10
Hartstein v. Missouri, No. 71-190, 10 CrL 4093
(December 14, 1971) 11
Henry v. State of Louisiana, 392 U.S. 655 (1968) 11
House v. Commonwealth, 169 S.E. 2d 572 (1969) 13
Hoyt , et al v. State of Minnesota, 399 U.S. 524 (1970) .. 11
Hudson v. United States, 234 A.2d 903 (1967) 22
I.M. Amusement Corporation v. Ohio,
389 U.S. 573 (1968) 11
Keney v. New York, 388 U.S. 440 (1967) 11
Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962) 9
Mazes v. Ohio, 388 U.S. 453 (1967) 11
Miller v. California, No. 70-73, argued January 19, 1972 . 28,29
People v. Rosakos, 74 Cal. Rptr. 34 at 36 (1968) 16
Potomac News Co. v. United States,
389 U.S. 47 (1967) 11
Quantity of Books v. Kansas, 378 U.S. 205 (1964) 11
Ramirez v. State, 430 P.2d 826 (1967) 22
Ratner v. California, 388 U.S. 442 (1967) 11
Redrup v. New York, 386 U.S. 767 (1967) 10,12
Robert-Arthur Management Corp. v. State of
Tennessee, 388 U.S. 578 (1968) 11
Roth v. United States, 354 U.S. 476 (1957) 8,9,10
Schackman v. California, 388 U.S. 454 (1967) 11
Sheperd v. New York, 388 U.S. 444 (1967) 11
Smith v. California, 361 U.S. 147, 4 L. Ed. 2d 205,
80 S. Ct. 215 15
Speiser v. Randall, 357 U.S. 513, 2 L. Ed. 2d 1460,
78 S. Ct. 1332 14
United States v. Klaw, 350 F.2d 155 (1965) 17
United States v. Groner, No. 71-1091, CA-5,
decided January 11, 1972 25
Walker v. Ohio, 398 U.S. 434 (1970) 11

Page

Wiener v. California, No. 71-443, 10 CrL 4093 (December 14, 1971) 11,29
Woodruff v. State, 237 A.2d 436 23

STATUTES

Code of Alabama–
Title 14, Section 374 4
Title 14, Section 374(3) 6

CONSTITUTIONAL PROVISIONS

18 U.S.C. Section 1461 8
18 U.S.C. Section 1462 25
28 U.S.C. 1257 (3) 2

Constitution of the United States–
First Amendment 2,3,6,7,8,9,12,28
Fourth Amendment 6,7
Fifth Amendment 2,3,6,7,12,28
Sixth Amendment 6,7
Fourteenth Amendment 2,3,6,7,8,12,28

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. _____

CHESTER McKINNEY, Ind. and d/b/a
PARIS BOOKSTALL,
and the Magazine "Blast Off Number 1",
the Magazine "Beavers, Vol. 4, No. 1",
the Magazine "The Special No. 3",
the Magazine "The Special No. 4",
the Magazine "Sumpin Different",
and the Magazine "Pleasure Partners,
Volume 1, Number 1",
Petitioners,

v.

THE STATE OF ALABAMA,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF ALABAMA**

Chester McKinney, and the above magazines. Petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Alabama, entered in this case on November 18, 1971.

OPINIONS BELOW

Chester McKinney operated an "Adults Only" bookstore on 5th Avenue, North, in Birmingham, Alabama. Six magazines purchased from said store were declared obscene in six equitable proceedings initiated by an Assistant Attorney General of Alabama in the Circuit Court of Jefferson County, Alabama. They were consolidated for trial and a consolidated appeal was taken to the Supreme Court of Alabama. The Circuit Court's opinions are unreported except inasmuch as they are excerpted in the opinion of the Supreme Court of Alabama, dated November 18, 1971, attached hereto as Appendix "A".

JURISDICTION

The Opinion of the Supreme Court of Alabama affirming the Trial Court and holding the magazines obscene was entered on November 18, 1971. This Petition for Certiorari is filed within ninety (90) days of said date. The jurisdiction of this Court is invoked under *28 U.S.C. § 1257(3)*.

QUESTIONS PRESENTED

1. Whether Alabama denied Petitioners' Due Process of law and freedoms of speech and press guaranteed by the *First, Fifth,* and *Fourteenth Amendments*, by finding six magazines to be obscene, where:

(a) there was no claim that the statute in question reflected a specific and limited state concern for juveniles; there was no suggestion of an assault upon individual privacy

by circulation in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to the magazines; and there was no evidence of pandering; and

(b) the magazines were virtually identical to other publications this Court has held were protected by the First and Fourteenth Amendments, from all Government suppression, whether criminal or civil, *in personam* or *in rem*, and are themselves projected expression under the First and Fourteenth Amendments.

2. Whether, consistent with the *First, Fifth* and *Fourteenth Amendments* and the constitutional standard for judging obscenity enunciated by this Court, "girlie" magazines can be condemned as obscene by a Trial Court, without evidence showing they meet each of three tests for obscenity.

3. Whether, consistent with the *First, Fifth* and *Fourteenth Amendments* and the constitutional standard for judging obscenity enunciated by this Court, "girlie" magazines may be condemned by the Alabama Supreme Court by its response to Petitioners contention in that Court, that the Trial Court should have applied the standard of the contemporary national community, that "the magazines in question offends (sic) not only the local mores of Jefferson County, Alabama, but are offensive both to contemporary standards in Jefferson County and across the country", when the record contained no evidence as to any element of obscenity as to contemporary community standards of any community.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the *First, Fifth* and *Fourteenth Amendments* to the *Constitution of the United States* and the provisions of the *Code of Alabama, Title 14, Section 374* are set forth in Appendix "B", attached hereto.

STATEMENT OF THE CASE

Petitioner Chester McKinney operated an "adults only" bookstore in Birmingham, Alabama, called the Paris Bookstall. On March 9, 1970, the Chief Investigator for the Attorney General's Office of the State of Alabama visited the Paris Bookstall and purchased six magazines. An Assistant Attorney General for the State of Alabama filed an affidavit with the bills of complaint filed in this case in which he alleged the magazines purchased by the Chief Investigator were, in his opinion, obscene. The bills of complaint, each specifying one of the six magazines, souglit decrees from the Tenth Judicial Circuit of Alabama, in equity, that the respective magazines were each obscene and an order declaring them to be contraband and to be seized and destroyed by the Sheriff of Jefferson County, Alabama. It was further prayed that Petitioner McKinney be permanently enjoined in Alabama for preparing, selling, exhibiting or commercially distributing or giving away, or offering to give away, while possessing with intent to sell, commercially distribute, exhibit, give away or offer to give away copies of said magazines.

An order to show cause was served upon Petitioner McKinney and a hearing was held, after which the Court found said magazines to be obscene and issued a temporary

injunction against the further sale, exhibition or publication of said magazines.

Demurrers were filed and overruled. Answers were filed in each case joining issue on the question of obscenity, among other things.

At the hearing on the issue of obscenity, no affirmative evidence as to what is or what is not obscene was presented to the Court. There was no proof that the publications complained against affront contemporary community standards, nor was there proof as to what constituted contemporary community standards. There was no evidence that the magazines appealed to the prurient interest in sex of any individual. There was no evidence of pandering, no evidence of sales to minors, no evidence that the magazines assaulted individual privacy in a manner so obtrusive as to make it impossible for an individual to avoid exposure to them.

In spite of the absence of proof, the magazines were, in each case, found obscene.

A timely appeal to the Supreme Court of Alabama followed and the six cases were consolidated in that Court. This Petition follows a determination of obscenity as to each magazine by the Supreme Court of Alabama.

HOW FEDERAL QUESTIONS ARE PRESENTED

On behalf of Petitioners, in each of the six cases, demurrers were filed, which alleged that the State's petitions were vague and questioning whether sufficient facts were

alleged to warrant a determination by the Court on the question of obscenity. The trial court overruled the demurrers.

Petitioners' answers, in each of the six cases, denied the authority of the State to institute the proceeding, denied that said magazines are obscene, pleaded that the State used the wrong test or criteria for determining the nature of the material; pleaded that the bills of complaint filed by the State did not comply with the language of the *Code of Alabama, Title 14, Section 374(3)*, pleaded that the test provided by said statute is unconstitutional on its face and repugnant to the *First, Fourth, Fifth, Sixth*, and *Fourteenth Amendments* to the *Constitution of the United States* Petitioners further pleaded *Title 14, Section 374(3)*, is unconstitutional on its face and repugnant to the *First, Fourth, Fifth, Sixth* and *Fourteenth Amendments* to the *Constitution of the United States*, as said provisions have been applied and construed by law enforcement officials of the State of Alabama in that, in the application of said statutes; law enforcement officials did not limit their prosecutional efforts, as is constitutionally required, to those instances where sales to minors have occurred, where wanton intrusion into the privacy and sensibilities of an adult who wishes to avoid confrontation with the materials sold has occurred by method of dissemination, and/or there is clearly demonstrated circumstances of *Ginzburg* type pandering. Petitioner Chester McKinney in his answers, filed a cross-bill alleging harrassment on the part of the State, and a denial of his *First Amendment* rights and irreparable injury. Petitioner's cross-bills prayed that the Court would rule said magazines not to be obscene and to permanently enjoin the State from enforcing said

statute and from instituting any new proceeding, either civil or criminal, against Petitioner.

On appeal to the Supreme Court of Alabama, Petitioners vigorously insisted that the pleadings and proof were entirely insufficient to support the relief granted. Such relief as was granted was contended to be in conflict with the protections afforded Petitioners under the *First, Fourth, Fifth, Sixth* and *Fourteenth Amendments* to the *Constitution of the United States*. Petitioner also contended, *inter alia*, that the magazines were not obscene in the constitutional sense, as a matter of law; that the prosecution must produce affirmative evidence that *First Amendment* materials are in fact obscene, and in so doing, must prove every element of the test of obscenity; and that the constitutionally proper test for community standards is the national community and not a local community, *i.e.*, State, County, Municipality.

The Opinion of the Supreme Court of Alabama rejected the contentions of Petitioners and found each magazine obscene and affirmed the decrees in each of the six cases.

The findings of the Supreme Court of Alabama were based on its viewing of the magazines "and the fact that their open and willing sale by the Respondent" was not denied. The Court itself described the magazines as "genital" magazines. The thrust of the Opinion of the Supreme Court is directed to a refutation of the "Stanley Doctrine", which was also urged by Petitioner below, but which is not urged herein.

REASONS FOR GRANTING THE WRIT

1. The "girlie" magazines involved herein are not obscene in the constitutional sense, as a matter of law, when sold under controlled circumstances.

The opinion of the Supreme Court of Alabama makes clear that there was no assault upon individual privacy by distribution in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to the magazines. There was no "pandering" of the type found significant in *Ginzburg v. United States*, 383 U.S. 463 (1966), or any sales to minors.

For these reasons, Petitioners contend that the decision of the Supreme Court of Alabama in which each of the six "girlie" magazines named therein was found obscene is in conflict with prior decisions of this Court, in which other magazines containing photographs focused on genitalia have been found not obscene.

This Court did not reach the constitutional issue underlying obscenity legislation until 1957, when it decided *Roth v. United States* and a companion case from the State of California entitled *Alberts v. California*. Both cases are cited as *Roth v. United States*, 354 U.S. 476 (1957). The *Roth* case involved an appeal from a conviction for violation of the basic federal obscenity statutes, 18 U.S.C. § 1461. Alberts involved a conviction under the California General Obscenity Statutes. The attorneys in both cases, in order to focus primarily on the underlying constitutional question, conceded for the sake of the case that the material in question was, in fact, obscene, thus was set for an unencumbered discussion of the *First Amendment* and obscenity regulation in both the federal and state context.

The Court in this very bold step held that the *First and Fourteenth Amendments*, under the guise of freedom of speech, did not protect conceivably obscene speech, and that

the same was unworthy of *First Amendment* protection, and that no balancing of harm or showing of clear and present danger was required to justify regulation by governmental authority of obscenity and dissemination thereof, since it was utterly worthless. The *Roth* case dealt only with commercial dissemination, and the Court was careful to point out in its opinion that the door barring federal and state encroachment into the area of *First Amendment* rights should be kept tightly closed and opened only the slightest crack to prevent intrusion upon more important interests.

The major premises on which the Court's reasoning in *Roth* was predicated were first, the existence of libel and blasphemy laws at the time the *First Amendment* was adopted and established the fact that "the unconditional phrasing of the *First Amendment* was not intended to protect every utterance"; and second, "this Court has always assumed that obscenity is not protected by the freedoms of speech and press."

During the years that followed the *Roth* case, the Court had an opportunity to further consider the issue of obscenity and very often, would summarily reverse the conviction or finding of obscenity by state or federal courts on the factual concept that the material before it could not be said to be obscene in the legal sense and would cite in support of their position their decision in *Roth v. United States.* From time-to-time, various other cases came before the Court which dealt with the governmental power to censor through massive use of the United States mail. See *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962). In the *Manual Enterprises* case, the Supreme Court criticized and ruled unconstitutional an attempt by the Post Office to regulate obscene material.

It would be time-consuming and fruitless to detail each and every case that has appeared before the Court after that time, but it is significant to note a trend developed, which found fruition in 1967 in the case of *Redrup v. New York*, 386 U.S. 767 (1967). For the first time, it became relatively clear what the Court meant when in *Roth* it made the reference to need to prevent erosion in the First Amendment rights by Congress or by the state to permit intrusion or encroachment only when necessary to prevent encroachment upon more important interests, when the Court, in its *per curiam* opinion, held the materials before it could not be said to be obscene in the constitutional sense. Thereafter, the Court laid down a suggested criteria for balancing the determination of whether material could be said to be obscene with the emphasis on the manner of dissemination, rather than on the object of dissemination.

The Court, in essence, suggested that where there was no evidence of sales to minors under state statutes reflecting a specific and limited concern for juveniles, nor where there was any dissemination or attempt at dissemination in a manner calculated to intrude into the privacy of an unwilling individual who wanted to avoid confrontation with this kind of material, or where there was no evidence of the type of "pandering" which the Court had seen significant in the case, *Ginzburg v. United States*, 383 U.S. 463 (1966), that no obscenity conviction or suppression could follow. Thereafter, the Court has reversed some thirty-three (33) cases, representing a wide cross-section from both federal and state, inferior and appellate courts, involving both criminal and civil condemnations, and the Court, in reversing these cases, cited only as its authority *Redrup v. New York*, *supra*. The cases reversed are: *Austin v. Kentucky*, 386 U.S. 767 (1967); *Gent*

v. Arkansas, 386 U.S. 767 (1967); *Ratner v. California*, 388 U.S. 442 (1967); *Cobert v. New York*, 388 U.S. 443 (1967); *Keney v. New York*, 388 U.S. 440 (1967); *Friedman v. New York*, 388 U.S. 441 (1967); *Aday v. United States*, 388 U.S. 447 (1967); *Avansino v. New York*, 388 U.S. 446 (1967); *Sheperd v. New York*, 388 U.S. 444 (1967); *Corinth Publications, Inc. v. Wesberry*, 388 U.S. 448 (1967); *Books, Inc. v. United States*, 388 U.S. 449 (1967); *Mazes v. Ohio*, 388 U.S. 453 (1967); *Schackman v. California*, 388 U.S. 454 (1967); *Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Central Magazines Sales, Ltd. v. United States*, 389 U.S. 50 (1967); *Potomac News Co. v. United States*, 389 U.S. 47 (1967); *Conner v. City of Hammond*, 389 U.S. 48 (1967); *Chance v. California*, 389 U.S. 89 (1967); *I.M. Amusement Corporation v. Ohio*, 389 U.S. 573 (1968); *Robert-Arthur Management Corp. v. State of Tennessee*, 388 U.S. 578 (1968); *Felton v. City of Pensacola*, 390 U.S. 340 (1968); *Henry v. State of Louisiana*, 392 U.S. 655 (1968); *Carlos v. New York*, 396 U.S. 119 (1969); *Cain v. Kentucky*, 397 U.S. 319 (1970); *Bloss v. Dykema*, 398 U.S. 278 (1970); *Walker v. Ohio*, 398 U.S. 434 (1970); *Hoyt, et al. v. State of Minnesota*, 399 U.S. 524 (1970); *Childs v. Oregon*, 401 U.S. 1006 (1971); *Bloss v. Michigan*, 402 U.S. 938 (1971); *Burgin v. South Carolina*, 404 U.S. 806 (1971); *Wiener v. California*, No. 71-443 10 CrL 4093 (December 14, 1971); *Hartstein v. Missouri*, No. 71-190, 10 CrL 4093 (December 14, 1971).

In none of the publications involved is there depicted sexual intercourse, fellatio, cunnilingus, or oral intercourse. The magazines are comparable to those involved in *Burgin v. South Carolina, supra, Bloss v. Dykema, supra,* and *Wiener v. California, supra.*

Under controlling decisions of this Court, they are not obscene in the constitutional sense, especially where, as here, none of the factors deemed important in *Redrup v. New York, supra,* are present.

2. There cannot be a constitutionally valid judicial determination of obscenity as to each of the magazines brought before the trial court, consistent with petitioners' rights to procedural and substantive due process required by the *Fifth and Fourteenth Amendments to the Constitution of the United States,* in the absence of any affirmative evidence on each of the constitutionally relevant elements of the standards for judging proscribable obscenity under the *First Amendment.*

Since obscenity prosecutions or injunctive proceedings as in this case are in themselves fraught with vagueness, the courts have held that in such prosecutions or proceedings undertaken under a constitutionally permissible basis, the prosecution or in this case the State of Alabama has the affirmative responsibility to adduce appropriate evidence to establish each element of its concept of obscenity, including contemporary community standards.

In Re *Giannini,* 72 Cal. Rptr. 655 (1968) the Supreme Court of California stated in pertinent part:

> "We conclude the convictions must be set aside because the prosecution failed to introduce any evidence of community standards either that Iser's conduct appealed to prurient interest or offended contemporary standards of decency . . . To sanction convictions without expert evidence of community

> standards encourages the jury to condemn as obscene or offensive to the particular juror . . . We conclude that the judgment must be vacated for lack of evidence as to whether applying contemporary community standards petitioner Isler's dance appealed to the prurient interests of the audience and offended accepted standards of decency."

The Supreme Court of the Commonwealth of Virginia likewise has held in the case of *House v. Commonwealth*, 169 S.E.2d 572 (1969), reported on September 5, 1969, on this issue as follows:

> "In the first place there is no evidence that according to or applying contemporary community standards the dominant theme of the magazines in question appealed the prurient interest of the reader or that they were patently offensive because they affronted contemporary community standards relating to the description or representation of sexual matters. That is, there is no evidence that these publications were offensive because they affronted contemporary community standards relating to the description of such matters.
>
> . . . . . .
>
> As to the sufficiency of the evidence, we agree with the defendant that since the statute provides punishment for 'every person who knowingly . . . commercially distributes . . . any obscene matter,' the burden was on the Commonwealth to show that the magazines were obscene and that the defendant knew they were obscene when he distributed them to retain dealer Swersky . . . In accord with this view we hold that in the absence of evidence that these magazines affronted the standards of the community, the

evidence on behalf of the Commonwealth was insufficient to sustain the conviction of the defendant."

The Supreme Court of the Commonwealth of Pennsylvania recently considered this issue in *Duggan v. Guild Theatre, Inc., et al.* 258 A.2d 865 (1969), and said in pertinent part as follows:

"Not has the district attorney proved that this movie 'affronts contemporary community standards' relating to the representation of sexual matters. Each one of his witnesses called to testify as to community standards admitted that they had no idea what these standards were. The district attorney in his brief admits that he produced no expert testimony on this issue, yet urges us to find that the mie affronts contemporary standards. This we cannot do. Courts of law are not capable of deciding what contemporary standards are, without the benefit of any evidence whatsoever. Cf. *Dell Publications*, 427 Pa. at 193, 223 A.2d at 843.

"As for the third independent test, the district attorney has not proved 'Therese and Isabelle' to be utterly without redeeming social value . . . .

"Thus the Commonwealth has not shown, under any one of the three independent standards set forth in *Memoirs* and *Dell Publications* that 'Therese and Isabelle' is constitutionally obscene."

Speiser v. Randall, 357 U.S. 513, 2 L.Ed.2d 1460, 78 S.Ct. 1332:

"Where the transcedent value of speech is involved, due process certainly requires in the circumstances of

this case that the State bear the burden of persuasion to show that the appellants engaged in criminal speech. Cf. *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 1 L.Ed. 2d 1469, 77 S.Ct. 1325, *supra*.

"The vice of the present procedure is that, where particular speech falls to close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding inherent in all litigation—will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens. This is especially to be feared when the complexity of the proofs and the generality of the standards applied, cf. *Dennis v. United States*, 341 U.S. 494, 95 L.Ed. 1137, 71 S.Ct. 857, *supra*, provide but shifting sands on which the litigant must maintain his position."

Smith v. California, 361 U.S. 147, 4 L.Ed. 2d 205, 80 S.Ct. 215, concurring Opinion of Justice Frankfurter:

"'. . .[F]or community standards or the psychological or physiological consequences of questioned literature can as a matter of fact hardly be established except through experts. Therefore, to exclude as irrelevant evidence that goes to the very essence of the defense and therefor to the constitutional safeguards of due process. The determination of obscenity no doubt rests with judge or jury. Of course the testimony of experts would not displace judge or jury in determining the ultimate question whether the particular book is obscene, any more than the testimony of experts relating to the state of the art in patent suits determines the patent ability of a controverted device.'

"There is no external measuring rod for obscenity. Neither, on the other hand, is its ascertainment a merely subjective reflection of the taste or moral outlook of individual jurors or individual judges. Since the law through its functionaries is 'applying contemporary community standards' in determining what constitutes obscenity, *Roth v. United States*, 354 U.S. 476, 489, 1 L.Ed.2d 1498, 1509, 77 S. Ct. 1304, it surely must be deemed rational, and therefore relevant to the issue of obscenity: to allow light to be shed on what those 'contemporary community standards' are. There interpretation ought not to depend solely on the necessarily limited, hit-or-miss, subjective view of what they are believed to be by the individual juror or judge. It bears repetition that the determination of obscenity is for juror or judge not on the basis of his personel [sic] upbringing or restricted reflection or particular experience of life, but on the basis of 'contemporary community standards.' Can it be doubted that there is a great difference in what is to be deemed obscene in 1959 compared with what was deemed obscene in 1859?"

People v. Rosakos, 74 Cal. Rptr. 34 at 36 (1968):

"This case must be reversed for a second reason, which is the holding in In re Giannini and Iser, 69 A.C. 588, 72 Cal. Rptr. 655, 446 P. 2d 535.

"In that case the court was dealing with violations of Penal Code Section 314, subdivision (1) and Penal Code Section 647, subdivision (a). (The alleged offenses occurred in the presentation of a dance before an audience. The court in that case affords the dance *First Amendment* protection unless the dance is obscene. In order to determine whether or not the dance was obscene the court holds at page 599, 72

Cal. Rptr. at page 662, 446 P.2d at page 542, . . . a finding of offensiveness to the accepted community standards of decency forms a prerequisite to a conclusion of obscenity,' and the court further states at pages 599-600, 72 Cal. Rptr. at page 663, 446 P.2d at page 543:

"Relying principally on the well established doctrine that jurors should not be endowed with the prerogative of imposing their own personal standards as the test of criminality of conduct, we hold that expert testimony should be introduced to establish community standards.

"We cannot assume that jurors in themselves necessarily express or reflect community standards; we must achieve so far as possible the application of an objective, rather than a subjective, determination of community standards.

"(2) In the case at bar no evidence of community standards was introduced. We therefore hold that the evidence is insufficient on the present record to sustain the conviction as to count VII.

"The judgment is reversed."

United States v. Klaw, 350 F.2d 155 (1965):

"Nor is mere 'patent offensiveness' enough. There must in addition be the requisite prurient appeal. Assuming that 'prurient appeal' can be adequately defined, there are still some questions: appeal to whose prurient interest? judge by whom? on what basis? For example, is it the average person who applies 'contemporary community standards' to determine if the 'dominant theme' appeals to 'prurient interest' (of someone)? Or is it someone else

applying 'contemporary community standards' to determine that the 'dominant theme' appeals to 'prurient interest' of the 'average person'? Do 'contemporary community standards' operate to reduce potential prurient appeal? Or do they operate to establish that some 'redeeming social importance' is present? Or do they operate to measure the 'patent offensiveness' of an excess of candor? Again, does the 'dominant theme' indicate that the prospective prurient appeal is great or slight, or does it suggest that other themes will supply the redeeming social importance? Perhaps the *Roth* statement is too compact—an unsurprising failing in an initial formulation, the Court itself has acknowledged that it 'is not perfect.' *Jacobellis v. Ohio, supra*, 378 U.S. at 191, 84 S.Ct. 1676. But the difficulties of articulating an adequate substitute need not dictate immutable adherence to such a will-o'-the-wisp.

"Having in mind the constitutional constrictions on the breadth of legislation affecting the freedom of expression, if appeal to prurient interest—on either an 'average man' or a 'deviant typical recipient' basis—is the statutory concern, then it seems desirable, indeed essential, that such appeal to someone be shown to exist. This the Government's view of *Roth* does not require. Nor should it be sufficient merely that the disseminator or publicizer things such appeal exists. The stimulation and reaction with which the 'obscenity' laws are concerned are unlikely to be a problem if the appeal is felt by none of the recipients, but only by the disseminator. While such a person may in some other ways be a potential problem for society, the 'obscenity' laws are concerned are unlikely to be a problem if the appeal is felt by none of the recipients, but only by the disseminator. While such a person may in some other ways be a potential problem for society, the

'obscenity' laws do not seem best calculated to cope with him. Moreover, the Court stresses in *Roth* the 'effect' of the material on the people reached by it. See 354 U.S. at 490, 77 S.Ct. 1304.

"... And if proof of prurient stimulation and response is generally important, it is particularly necessary when the prurient interest may be that of a devient segment of society whose reactions are hardly a matter of common knowledge.

"However, some proof should be offered to demonstrate such appeal, thereby supplying the fact finders with knowledge of what appeals to prurient interest so that they have some basis for their conclusion. As was observed earlier in Klaw's troubles with the postal censors, 'obviously, the issue of what stirs the lust of the sexual deviate requires evidence of special competence.' *Klaw v. Schaffer, supra*, 151 F.Supp. at 539 n.6; see *Manual Enterprises, Inc. v. Day*, 110 U.S. App. D.C. 78, 289 F.2d 455 (1961, rev'd, 370 U.S. 478, 82 S.Ct. 1432, 8 L.Ed.2d 639 (1962)).

"In this case, although Judge Wyatt wisely suggested, and the Government considered, introduction of such evidence, there was none. Because of this Judge Wyatt stated at the end of the case, as he had to, that there was no 'evidence from which the jury could find that it (Nutrix materials) would in fact appeal to the prurient interest of a particular class.'

"Furthermore, nothing in the record shows that the material even has prurient appeal to the average man.

"... In this case, however, the only predicate for any conclusion about prurient appeal was the material

itself, as if *res ipsa loquitur*. The jurors were, therefore, left to speculate. They were invited to behold the accused material and, in effect, conclude simply that it is undesirable, it is distasteful, it is disgusting. Knowing perhaps that they would not be interested in obtaining more of the material they might wonder why anyone else would, and conclude that the only answer is 'prurient appeal.' "

Commonwealth v. Dell Publications, Inc., 233 A.2d 840 (1967):

"In the instant litigation, however, both the comments made during the hearing and the formal adjudication indicate that the hearing judge proceeded on the premise that, in the final analysis, his own subjective reaction, and and by itself, was the determining factor. As the law of obscenity now stands the judge's subjective analysis is of course relevant to the ultimate issue, but the mere donning of judicial robes does not make us the embodiment of the 'average person' nor do our tastes necessarily parallel those of the 'contemporary community.'

"The totally subjective approach adopted by the court below was palpable error.

. . . . . .

"A. Appeal to Prurient Interest. This is perhaps the most difficult of the three elements to define. What appeals to the prurient interest of one individual may not appeal to the prurient interest of another. Some cases may pose a problem of group definition, but it is conceded that 'Candy's' appeal is to the community at large and thus we must judge its prurient appeal to the 'average person.'

"Unfortunately, there was practically no testimony offered concerning 'Candy's' appeal to the prurient interest of the average adult citizen.

"The Commonwealth presented practically no evidence whatsoever concerning 'Candy's' relationship to contemporary community standards."

Dunn v. Maryland State Board of Censors, 213 A.2d 751 (1965):

"In the present instance the Board did no more than offer the film; it produced no other evidence whatever. We think it plain that save in the rare case where there could be no doubt that the film is obscene the Board will not meet the burden of persuasion imposed on it by the Constitution and the statute without offering testimony that the picture is obscene in that (a) the average person, applying community standards, would find that its dominant theme, taken as a whole, appeals to prurient interests, (b) that the film goes substantially beyond customary limits of candor in description or representation of sex or other matters dealt with, and (c) that it is subject to proscription because it is utterly without redeeming social importance considered in light of the fact that '. . . sex and obscenity are not synonymous. *Roth*, U.S. 476, 487, 77 S.Ct. 1304, 1310, 1 L.Ed.2d 1498, 1508, and the fact that material dealing with sex in a manner that advocates ideas or has literary, scientific or artistic value or any other form of social importance may not be branded as obscenity. In our view, neither the judge who may sit in the circuit court to review the adtion of the Board nor the judges of this Court ordinarily would be qualified to determine whether a film exceeded these constitutional standards or tests without enlightening testimony on these points."

Hudson v. United States, 234 A.2d 903 (1967):

"Where the material involved is not patently obscene, neither a judge nor twelve local jurors chosen at random are capable of determining the standards of tolerance prevalent in the nation generally without first being given some competent evidence of what those standards are. *United States v. Klaw*, 350 F.2d 155, 168 n. 24 (2d Cir. 1965). A guilty verdict is an obscenity trial should not be a legal expression of revulsion by the local community from which the jury is drawn. If a case is submitted to the trier of fact without first establishing the community standards by competent evidence to which the trier may refer, the verdict at best will be based on the prevailing customs in a limited geographical area and, at worse, upon the 'subjective reflection of taste or oral outlook of individual jurors or individual judges. . . .' [T]he determination of obscenity is for juror or judge, not on the basis of his personal upbringing or restricted reflection or the particular experience of life, but on the basis of 'contemporary community standards.' *Smith v. People of State of California*, 361 U.S. 147, 165, 80 S.Ct. 215, 225, 4 L.Ed.2d 205 (1959), concurring opinion of Mr. Justice Frankfurter. These standards must be established by relevant evidence at trial.

"Since the prosecution in the present case had the burden of proving relevant community standards prevailing in the nation generally and elected not to do so, we hold that the Government failed to establish an essential element of the crime charged and the verdicts of guilty were therefore in error."

See also *Ramirez v. State*, 430 P.2d 826 (1967), and *City of Phoenix v. Fine*, 420 P.2d 26 (1966).

> "... [W]e reverse on the ground that the state has failed on any conceivable basis to prove its case. Here, as will be recalled, the only evidentiary predicate for the conclusion that the publications are obscene under any of the views expressed in Redrup are the publications themselves. Apparently, the prosecution believes that a theory [sic] akin to *res ipsa loquitur* applies to obscenity cases, and that no evidence other than the presentation of the magazines is required in order to establish a violation of the statutory and constitutional standards."

And recently in the Court of Special Appeals of Maryland in the matter styled *Woodruff v. State*, 237 A.2d 436. His Honor, Judge Moylan appropriately stated:

> "In measuring then the prurient appeal of this theme, we must do so in terms of a particular audience. *There was no evidence in this case to indicate that, under Mishkin, it was 'designed for or primarily disseminated to a clearly-defined deviant sexual group.'* We must, therefore, measure prurience in terms of its appearance to the average person. (Emphasis added.)
>
> . . . . . .
>
> "It is axiomatic that to judge whether something offends contemporary community standards, one must know what those contemporary community standards are. In this case, the State neither showed nor offered any evidence whatsoever as to the standards prevailing in Prince George's County, the State of Maryland or the United States, whichever of those communities will ultimately be deemed the appropriate 'community.' *Jacobellis v. Ohio, supra.* By way of defense, the appellant did make two

abortive attempts to offer testimony as to the prevailing community standards, at least within Prince George's County.

. . . . . .

"This failure of the trial court to afford the appellant an opportunity to prove what he believed to be the prevailing community standard is not material, however, in view of our belief that the State failed utterly to make even a *prima facie* showing of any community standard whatsoever. We feel, as did Judge Orth in his concurring opinion in *Dillingham v. State, supra*, 9 Md. App. at 715, 267 A.2d at 801:

> 'I cannot determine from the record whether or not the material affronts contemporary community standards relating to the description or representation of sexual matters. The State, as the opinion of the Courts points out, did not prove what the contemporary community standards are, either national or local. . . . It is not possible to determine that the material here affronted contemporary community standards when the standards themselves are not delineated. Thus, the second element was not proved and this alone would be good reason to reverse the conviction.'

. . . . . .

"In making our own independent, reflective judgment upon the material, we feel that the view expressed by Judge (now Chief Judge) Hammond in *Dunn v. Maryland State Board of Censors, supra*, 240 Md. at 255, 213 A.2d at 754, even though dealing with alleged obscenity in the context of motion picture censorship, is pertinent:

> 'In our view, neither the judge who may sit in the circuit court to review the action of the Board nor the judges of this Court ordinarily would be qualified to determine whether a film exceeded those constitutional standards or tests without enlightening testimony on these points.'

> "Even were the material before us obscene by any test, however, the conviction of the appellant here would have to be reversed because of the utter failure of the State to show any evidence of *scienter* on his part as required by *Smith v. California*."

In the recent case of *United States v. Groner, No. 71-1091*, CA-5, decided January 11, 1972, the Fifth Circuit Court of Appeals reversed a conviction for using a common carrier in interstate commerce to transport a quantity of obscene books in violation of 18 U.S.C. §1462:

> "There remains little doubt that this Court is obligated to make an independent evaluation on the issue of whether the material in question is obscene. The issue of obscenity involves the application of first amendment rights to the printed word. The courts, not the reasonable jury or even the majority of reasonable men, are responsible for the protection of freedom of speech. The substantial evidence test usually employed to reinforce jury verdicts, thus cannot be utilized to apply these constitutional doctrines.
>
> "We have little trouble in finding the books involved in the instant case to be vile, filthy, disgusting, vulgar, and, on the whole, quite uninteresting. We do, however, have difficulty in equating these adjectives with the constitutional definition of obscenity.

"Knowing the legal test for obscenity and applying the same in light of recent Supreme Court decisions, however, are two entirely different matters. We are completely incapable of applying the test in the instant case. Without some guidance, from experts or otherwise, we find ourselves unable to apply the *Roth* standard with anything more definite or objective than our own personal standards of prudence and decency, standards which should not and cannot serve as a basis for either denying or granting first amendment protection to this or any other literature.

"Jurors in an obscenity case are called upon to determine contemporary community standards and must then compare the materials in question to determine whether they go 'substantially beyond the limits of candor' in describing sex or nudity. Each juror is an individual separate in his morals, experience and taste. The only standards which govern his conduct and his judgment are his own, not those of the community as a whole, whether state-wide or national. Although such unfettered discretion is acceptable in determining questions of negligence, probable cause and intent, it has no place in determining whether material is to be armed with first amendment protection. We can come to no other conclusion under the circumstances.

"This Court finds itself in the same position as that of the jury in such a case. We cannot take judicial notice, without even a scintilla of evidence, of what constitutes the community standard of decency at this or any other time. If such a standard exists at all, we would expect that it would be in a constant evolutionary and even revolutionary flux, the fact of which militates against our exercising uninformed judgment at any particular point in time. At best it would be a matter of pure chance as to whether we

as a Court, or an individual's left to our own devices and without the aid of evidence, could determine the correct standard.

"Moreover, we think evidence of the materials' prurient appeal was necessary. The material in the instant case does not appeal to the prurient interests of this Court. Indeed, we have trouble imagining its appealing to the prurient interests of any normal, sane, healthy individual. It is just too disgusting and revolting to be so classified. *To allow a case to go to a jury of layman under such circumstances is to invite the jurors' equating patent offensiveness with prurient appeal and aiding suppression simply on the basis of speculation and suspicion about the prurient appeal of material to some known, undefined person whose psyche is not known. The possibility, even the probability, that jurors would be uncommonly sanctimonious or Puritanical in such a state of affairs should be obvious to anyone who has noted the numerous defeats of jury tensors at the hands of the appellate courts.*

"We wish to make it perfectly clear what we hold, and what we fail to hold today in the instant case. We have expressed no opinion on the issue of whether the materials involved here is or is not obscene. *In fact, our inability to do so is the basis for our holding that expert testimony is required on the elements of obscenity in order to furnish juries and this Court with an objective basis for deciding on the issue of first amendment rights.*" *United States v. Groner, supra.* (Slip Opinion).

No evidence was produced by the State of Alabama through any competent witness as to the prurient interest appeal of any publication. Similarly there was no evidence reflecting upon the prevailing community standards. The State

did not produce any evidence as to whether the publications did not contain any redeeming social value. And there was no evidence that the publications exceeded the prevailing community standards.

It is not incumbent upon the citizen, in securing those freedoms guaranteed to him by virtue of the *First and Fifth Amendments to the Constitution of the United States*, to affirmatively show that the materials constitute protected expression. But the burden is upon them who seek to suppress the presumptively protected materials to affirmatively show by sufficient competent evidence that the materials are not protected by the *Constitution of the United States* before the materials can be suppressed, seized, and destroyed.

To find a publication obscene on such an utter lack of affirmative evidence constitutes a denial of Due Process secured to Petitioners by virtue of the *Fifth Amendment and Fourteenth Amendment* to the *Constitution of the United States*. It is respectfully represented that the State of Alabama has utterly failed to present a *prima facie* case of obscenity.

3. The Question of Whether Under the *First* and *Fourteenth Amendments* a "National Standard" is a necessary criterion for establishing "contemporary community standards" is presently pending before this Court in *Miller v. California*, No. 70-73, *argued* January 19, 1972.

The precise question raised by Petitioners' contention that the appropriate "contemporary community standards" are those of the national community has been fully briefed and argued as recently as January 19, 1972. Petitioners adopt the

argument made in the Brief for Petitioners in *Miller v. California*, No. 70-73, *Petition for Certiorari pending.*

Obviously, the decision on this issue will have ramifications touching upon the continued development of our Federal System of Government, as well as upon the meaning of the Commerce Clause and of the Full Fifth and Credit Clause of the Constitution of the United States.

CONCLUSION

The Trial Court found the magazines involved herein obscene on the basis of his personal reaction to them, unguided by evidence on the elements of obscenity. The magazines are of the type involved in *Burgin v. South Carolina*, 404 U.S. 806 (1971), *Bloss v. Dykema*, 398 U.S. 278 (1970), and *Wiener v. California*, No.71-443, ___ U.S. ___, 10 CrL 4093 (1971). The Supreme Court of Alabama applied a local standard but, in passing, declared that the magazines offended "across the country" without there having been any evidence in the record from which such an inference could be made. The materials herein are not obscene and none of the factors mentioned in *Redrup* were present.

For the foregoing reasons, it is respectfully urged that this Petition for a Writ of Certiorari be granted.

Respectfully submitted

ROBERT EUGENE SMITH, Esq.
Suite 507
102 W. Pennsylvania Avenue
Towson, Maryland, 20214
(301) 821-6868

FERRIS S. RITCHEY, Esq.
825 Frank Nelson Building
Birmingham, Alabama, 35203
(205) 252-2191

Counsel for Petitioners.

Of Counsel:

D. FREEMAN HUTTON,
Esquire
1175 Peachtree St. N.E.
Atlanta, Georgia 30309
(404) 892-8890

APPENDIX A

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
OCTOBER TERM, 1971-72

Chester McKinney, Ind. and d/b/a Paris Bookstall
And the Magazine "Blast Off Number 1"
the Magazine "Beavers, Vol. 4, No. 1"
the Magazine "The Special No. 3"
the Magazine "The Special No. 4"
the Magazine "Sumpin Different"
the Magazine "Pleasure Partners, Volume 1, Number 1"

6 Div. 806 - 811

v.

STATE OF ALABAMA

Appeal from Jefferson Circuit Court, In Equity

PER CURIAM

Chester McKinney owned and operated an "Adults Only" book store on 5th Avenue, North, in Birmingham, Alabama. The windows of the store were painted so that the items offered for sale were not visible except to those who entered the store. It does not appear that there was any type of promotion or advertising to stimulate the sales of the book store or any sales to minors.

On March 9, 1970, one D. H. Johnson, Chief Investigator for the Attorney General's office of the State of Alabama, visited the book store as an investigator of pornography and purchased six magazines which were openly offered for sale.

The magazines he purchased were sealed with cellophane covers so that they could not be picked up and thumbed through. The front and back covers, however, were clearly visible through the cellophane covers and in one or more of these covers were the photographs of a female with her feet spread-eagled apart, exposing her genital organs. On the basis of the sale and purchases of these magazines the Assistant Attorney General in the State of Alabama filed bills of complaint against each magazine in the equity side of the Circuit Court of Jefferson County praying that the magazines be adjudicated obscene and that a temporary injunction be issued against their further exhibition or sale in this State. Together with the bill of complaint was an affidavit from the Assistant Attorney General alleging that in his opinion the purchased magazines were obscene. The magazines themselves were attached as exhibits to the bills. The respondent demurred to the complaint raising constitutional questions and upon the demurrers being overruled he filed an answer denying that the magazines were constitutionally obscene and a cross-bill seeking an injunction restraining further interference with the operation of the business. The bills were filed pursuant to the provisions of Alabama Law on Obscenity which appears as Chapter 64 of Title 14 in the pocket part of the 1958 Recompiled Code of Alabama.

Paragraph 7 of each of the complaints charged as follows:

> "7. Complainants represent unto your Honors that said magazine is obscene in that its dominant theme throughout appeals only to the prurient interest in sex, in that it is patently offensive because it affronts contemporary community standards relating to the representation of sexual matters and because said magazine is utterly without redeeming social value or importance; and, further, said magazine is obscene because it is or was, at the time of its possession by the respondents aforesaid, being pandered for the sole purpose of the commercial exploitation of sex. The sole

function of said magazine is the presentation of photographs of nude persons in lewd and lascivious poses calculated to expose to unhampered view the genital organs of said persons and exhibited only to arouse the prurient interest of the reader in sex."

The cases were consolidated for trial.

Only one witness testified for the complainant. He merely testified to the purchase of the magazines in question from the book store and as to its location and the fact that it had the quotation "Adults Only" on the sign both inside and outside the store and as to the other facts set forth above.

The respondent called as his only witness the Assistant Attorney General who had instituted the proceedings. He was examined by the complainant as to his legal knowledge of the various opinions of the courts on the matter concerning the subject of obscenity. For what purpose this examination was conducted, we do not speculate.

No further evidence was offered by either party, thereupon the court entered the following decree:

"FINAL DECREE

"This cause came on to be heard and was submitted upon pleadings and proof as noted on June 23, 1970.

"This cause was filed under Title 14, Section 374 (3) of the Code of Alabama of 1940 as recompiled and amended.

"The party Complainant is properly styled under the provisions of Chapter 64-A of said Title 14 and the party Respondents are properly named thereunder. The prayer for relief in the original Bill

of Complaint prays for an adjudication by the Court that the magazine, the subject of this action, contains matter that is obscene, for a permanent injunction against the preparing, selling, exhibiting, commercially distributing, giving away or offering to give away or possessing it with the intent to sell and commercially distribute or exhibit or offer to give it away, and for its surrender, seizure and destruction.

"The Cross-Bill of the Respondent, Chester McKinney, prays for a ruling by the Court that the matter contained in the said magazine is not obscene, and further prays that the Court will enjoin the Complainant-Cross-Respondent from enforcing the said Statute upon which the Bill of Complaint is founded and from instituting any new civil or criminal proceedings against Respondent-Cross-Complainant.

"The Court must found its adjudication of obscenity, vel non, upon the prescribed definition contained in the said Section 374 (3) as follows:

"'"Obscene" means lewd, lascivious, filthy, and pornographic and that, to the average person, applying contemporary community standards, its dominant theme taken as a whole appeals to prurient interest.' The Court finds that the publication complained against comes within the definition of 'printed or written matter or material' as set forth in said subsection.

"Applying the above definition of the word 'obscene' to the printed or written material or matter complained against the Court finds that it is obscene. The Court gives weight and credence to the testimony of the witnesses for Complainant relative to the question of the obscenity of the said material; and,

further, this Court has been, for the past 61 years a member of the society making up the community of Birmingham in Jefferson County, Alabama and, as such, is aware of the contemporary community standards, in said community, relative to the question of whether printed or written matter or material is obscene, within the meaning of the said Statute.

"The question of the obscenity, vel non, of the said magazine is the portal question in this cause, and having been by the Court decided it, is CONSIDERED, ORDERED, ADJUDGED AND DECREED as follows:

"*ONE*: That certain magazine or publication described in the Bill of Complaint as 'Blast Off Number 1' is declared to be 'obscene' within the meaning of the word as set forth in Title 14, Section 374 (3), 1940, Code of Alabama as recompiled and amended.

"*TWO*: The said magazine is declared to be contraband.

"*THREE*: The Sheriff of Jefferson County is hereby ordered to seize and destroy all copies of the said magazine in the possession of the Respondent, Chester McKinney, individually and doing business as Paris Bookstall.

"*FOUR*: The respondents are permanently enjoined from preparing, selling, exhibiting or giving away, or offering to give away or possession with the intent to sell, commercially distribute, exhibit, give away or offer to give away any copy of the said magazine.

"*FIVE*: The relief prayed by Respondent, Chester McKinney, individually and doing business as Paris

Bookstall, is denied, and the said Cross-Complaint is dismissed.

"*SIX*. The costs of this action are taxed to the Respondent, Chester McKinney, individually and doing business as Paris Bookstall, for which let execution issue.

"DONE and ORDERED this the 30th day of June, 1970.

"Wm. C. Barber
CIRCUIT JUDGE IN
EQUITY SITTING"

Similar decrees were entered as to the other five magazines.

Amidst the sea of words and the shifting sands of legal writing as to what constitutes obscenity not subject to sale and distribution to adults one can well be led away from solid ground. The appellant refers again and again in his brief to the magazines as "girlie" magazines. A more apt description would be, "genital" magazines. No claim is made or proof offered that they were of any artistic merit or other than lewd in general content or had any appeal other than prurient. Even a cursory examination reveals their wholly pornographic nature from which pollutants of the mind is all that could eminate.

We are not unaware that the burden of proof of obscenity was on the complainants and that the oral proof was scant but the silent witnesses, that is the magazines themselves, which are a part of the record under review and the fact that their open and willing sale by the respondent is not denied suffices to enable us to pass upon the obscenity, vel non, of the magazines. From viewing them we are persuaded that in them we find a coalescence of the following elements:

(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

We find ourselves in full accord with the holding of the Supreme Court of Florida in the recent case of *May v. Harper*, 250 So.2d 880, from which we quote:

> "As their first point on appeal appellants contend that by virtue of Redrup v. New York, 386 U.S. 767, 87 S. Ct. 1414, 18 L. Ed.2d 515 (1967), and the summary reversals based thereon, together with Stanley v. Georgia, 394 U.S. 557, 89 S. Ct. 1243, 22 L. Ed.2d 542 (1969), they may engage in the commercial sale and distribution of obscene materials so long as there is no pandering, sale to minors, or an invasion of the privacy of others by their method of operation. Appellants are clearly in error. The United States Supreme Court's affirmances of Milky Way Productions, Inc. v. Leary, 305 F.Supp. 288 (S.D. N.Y. 1969), aff'd New York Feed Co. v. Leary, 397 U.S. 98, 90 S. Ct. 817, 25 L. Ed.2d 78 (1970), and Gable v. Jenkins, 309 F. Supp. 998 (N.D. Ga. 1969), aff'd 397 U.S. 592, 90 S. Ct. 1351, 25 L. Ed2d. 595 (both of which were decided subsequent to Redrup and Stanley), were affirmances of cases specifically holding that no additional tests for obscenity are required beyond the Roth-Memoirs standards. Shortly after appellants' brief was filed in this Court, the United States Supreme Court announced in United States v. Reidel, 402 U.S. 91 S. Ct. 1410, 28 L. Ed.2d 813 (1971), that the Court was renewing its adherence to Roth and sharply limiting its prior holding in Stanley."

We therefore affirm the decrees appealed from, but in doing so observe and find that the obscenity, vel non, of the magazines in question offends not only the local morals of Jefferson County, Alabama, but are offensive both to contemporary standards in Jefferson County and across the country.

AFFIRMED.

Heflin, C.J., Coleman, Bloodsworth, Maddox, and McCall, JJ., concur.

APPENDIX B

First, Fifth and Fourteenth Amendments, U.S.C.

FIRST AMENDMENT.
CONSTITUTION OF THE UNITED STATES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assembly, and to petition the Government for a redress of grievances.

FIFTH AMENDMENT.
CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT.
CONSTITUTION OF THE UNITED STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TITLE 14, § 374 CODE OF ALABAMA

Alabama Law on Obscenity

§ 374(1). **Title of chapter.** This chapter shall be known as the Alabama Law on Obscenity and may be referred to by that designation.

§ 374(2). **Purpose of chapter.** The spread of obscene publications during the past several years has become a matter of increasingly grave concern to the people of this state. The elimination of this evil and the consequent protection of the citizens and residents of this state against such publications are in the best interests of the morals and general welfare of the people. The accomplishment of these ends can best be achieved by providing public prosecutors both with the speedy civil remedy for obtaining a judicial determination of the character and contents of publications and with an effective power to reach nonresidents responsible for the composition, publication, and distribution of obscene publications within this state.

§ 374(3). **Definitions.** The following words, terms, and phrases used in this chapter shall, for the purpose of this chapter, have the meaning respectively ascribed to them in this section:

"Mailable matter" means (a) printed or written matter or material having second-class mailing privileges under the laws of the United States, or (b) any other printed or written matter or material which has not been determined to be nonmailable under the laws of the United States.

"Obscene" means lewd, lascivious, filthy and pornographic and that to the average person, applying contemporary community standards, its dominant theme taken as a whole appeals to prurient interest.

"Person" means any individual, partnership, firm, association, corporation or other legal entity.

"Printed or written matter or material" means any book, pamphlet, magazine, periodical, newspaper, picture magazine, comic book, story book, or other printed or written matter, but does not include written or printed matter or material used by or in any religious scientific or educational institution.

§ 374(4). **Importation, sale or possession of obscene printed or written matter; penalties.**—(1) Every person who, with knowledge of its contents, sends or causes to be sent, or brings or causes to be brought, into this state for sale or commercial distribution, or in this state prepares, sells, exhibits or commercially distributes, or gives away or offers to give away, or has in his possession with intent to sell or commercially distribute, or to give away or offer to give away, any obscene printed or written matter or material, other than mailable matter, or any mailable matter known by such person to have been judicially found to be obscene under this chapter, shall be guilty of a misdemeanor and, upon conviction, shall be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than one year, and may be fined not more than two thousand dollars for each offense, or be both so imprisoned and fined in the discretion of the court.

(2) Every person who, with knowledge of its contents, has in his possession any obscene printed or written matter or material, other than mailable matter, or any mailable matter known by such person to have been judicially found to be obscene under this chapter shall be guilty of a misdemeanor and, upon conviction, shall be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than six months, or may be fined not more than five hundred dollars for each offense or be both so imprisoned and fined in the discretion of the court.

§ 374(5) **Equitable action to adjudicate obscenity of mailable matter imported, sold or possessed.** Whenever the solicitor for any judicial circuit or county solicitor has reasonable cause to believe that any person, with knowledge of its contents, is (1) engaged in selling or causing to be sent, bringing or causing to be brought into this state for sale or commercial distribution, or is (2) in this state, preparing, selling, exhibiting or commercially distributing or giving away, or offering to give away, or has in his possession with intent to sell or commercially distribute, or to exhibit or give away or offer to give away, any obscene mailable matter, the solicitor for the judicial circuit or county into which such mailable matter is sent or caused to be sent, brought or caused to be brought, or in which it is prepared, sold, exhibited, or commercially distributed or given away or offered to be given away, or possessed, may institute an action in equity in the circuit court of any court having equity jurisdiction of the affected county for an adjudication of the obscenity of the mailable matter.

§ 374(6) **Same; complaint.** The action authorized by section 374(5) shall be commenced by the filing of a complaint to which shall be attached, as an exhibit, a true copy of the allegedly obscene mailable matter. The complaint shall:

(a) be directed against the mailable matter, by name or description;

(b) allege its obscene nature;

(c) designate as respondents and list the names and addresses, as known, of its author, publisher and any other person sending or causing it to be sent, bringing or causing it to be brought into this state for sale or commercial distribution, and of any person in this state preparing, selling, exhibiting or commercially distributing it, or giving it away or offering to give it away, or possessing it with the intent to sell or commercially distribute or exhibit or give away or offer to give it away;

(d) pray for an adjudication that it is obscene;

(e) pray for a permanent injunction against any person sending or causing it to be sent; bringing or causing it to be brought, into this State for sale or commercial distribution or in this state preparing, selling, exhibiting, or commercially distributing it, giving away or offering to give it away, or possessing it with the intent to sell or commercially distribute or exhibit or give away or offer to give it away; and

(f) pray for its surrender, seizure and destruction.

§ 374(7). Same; dismissal; temporary injunction; order to show cause; service of process.–Upon filing of the complaint described in section 374(6), the solicitor or register of the court shall present the same; including the exhibit thereto, as soon as practicable to the court for its examination. If there is no probable cause to believe that the mailable matter described in the complaint is obscene, the court shall dismiss the complaint. If the Court finds probable cause to believe such matter to be obscene it may forthwith, issue an order temporarily restraining and prohibiting the sale or distribution of such matter and it shall issue an order to show cause why the same shall not be adjudicated obscene, returnable not less than ten days after its service, directed against the mailable matter by name or description and directing the service of a copy thereof, together with a copy of the complaint, upon such mailable matter and upon each of the respondents, named in the complaint. Service of such order shall be made upon such mailable matter at its place of publication or its editorial offices as shown therein. Service of such order may be made in any manner provided by law and in case of mailable matter published or edited outside the state of Alabama and of any nonresident respondent, by registered or certified mail directed, to the mailable matter or the respondent to be served at the address shown in the complaint. Proof of such mailing shall be deemed to be prima facie evidence of service of such order upon the mailable matter or any respondent for the purposes of this section.

§374(8). **Same; appearance, answer and trial date; order on default.**—(1) On or before the return date specified in the order to show cause, the mailable matter and each respondent may appear and file defensive pleadings.

(2) The court may permit any person to appear and file an answer as amicus curiae.

(3) If no person files an answer or other defense on or before the return date specified in the order to show cause, the court may forthwith determine whether the mailable matter is obscene and enter an appropriate order.

(4) Upon the expiration of the time for filing answer and other defenses by the mailable matter and other respondents, the court shall set a date for the trial of the case.

§374(9). **Same; speedy trials; rules of procedure.**—The public interest requires that all actions prescribed by this chapter, other than criminal actions under section 374(4), be heard and disposed of with the maximum promptness and dispatch commensurate with constitutional requirements, including due process, freedom of press and freedom of speech. The rules of civil procedure pertaining to equity cases shall be applicable to the trial of such actions except that the time limits therein concerning notice of trial, the presentation of evidence, and other proceedings may be shortened, if the party or parties affected or concerned have notice thereof and the court finds the same to be in the public interest.

§374(10). **Same; decree; enforcement.**—In the event the court finds the mailable matter to be obscene, it shall enter a decree to such effect and may, in such decree or in subsequent orders of enforcement thereof:

(a) enter a permanent injunction against any respondent, prohibiting him from doing or continuing to do any thing condemned by this chapter;

(b) direct any resident respondent to dispose of all such obscene mailable matter in his possession or under his control under such conditions and within such time as the court may find to be reasonable;

(c) direct all sheriffs in the state to seize and destroy all such obscene mailable matter in the possession or under the control of any respondent who shall fail to comply with the court's orders;

(d) enter any other and appropriate orders to effectuate the decree or injunction.

§374(11). **Same; contents and effect of injunctions; service of copies of orders.**— Every order granting an injunction shall set forth the reason for its issuance, shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint, the act or acts restrained and shall be binding only upon the respondents to the action and upon those persons in active concert or participation by contract or arrangement with such respondents who receive actual notice of the order by personal service or otherwise.

Copies of the order of the court, finding any matter to be obscene, and all orders of injunction issued in regard thereto, shall be served upon all respondents named in the complaint and in the manner as provided in section 374(7) of this chapter.

§374(12). **Importation, sale or possession of mailable matter found obscene.**— Any mailable matter which is sent or caused to be sent, brought or caused to be brought into this state for sale or commercial distribution, or which in this state is sold, exhibited or commercially distributed, given away or offered to be given away or offered to be given away by any person with knowledge of the decree finding it to be obscene, or is in the possession of any such person with intent to sell or commercially distribute or exhibit, or give away or offer to give away, is subject to the provisions of section 374(4) of this chapter.

§374(13). **Violation of injunction.**—Any respondent or any person in active concert or participation by contract or agreement with such respondent, with actual notice by personal service or otherwise, of any injunction or restraining order entered pursuant to sections 374(10) and 374(11) of this chapter, and who shall disobey any of the provisions thereof, shall be guilty of contempt of court.

§374(14). **Extradition of person in another state charged with continuing violation.**—In all cases in which a court has entered its decree pursuant to section 374(10) that the mailable matter in question is obscene, and a charge of continuing violation is thereafter brought against a person who is a respondent to such decree, who cannot be found in this state, the governor shall, unless such person shall have appealed from such decree and such appeal has not been finally determined, demand his extradition from the executive authority of the state in which such person may be found pursuant to the laws of this state.

§374(15). **Presumption from possession of obscene matter; burden of proof.** The possession of any three of the things enumerated in section 374 (4) of this chapter (except the possession of them for the purpose of return to the person from whom received) shall create a presumption that they are intended for sale or commercial distribution, exhibition or gift, but such presumption shall be rebuttable. The burden of proof that their possession is for the purpose of return to the person from whom received shall be on the possessor.

§374(16). **Nonresidents and others importing obscene matter submit to jurisdiction of courts.** In order to protect the morals and general welfare of the citizens and residents of this state against obscene printed or written matter or material originating outside of this state, it is the purpose of this section to subject to the jurisdiction of the courts of this state those persons, including non-residents, who are responsible for the importation of such matter into this state

and, by such act, submit themselves to the jurisdiction of the court of this state and any action authorized by section 374(5) of this chapter.

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
MAR 29 19[illegible]
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1052

CHESTER McKINNEY, Ind. and d/b/a
PARIS BOOKSTALL,
and the Magazine "Blast Off Number 1",
the Magazine "Beavers, Vol. 4, No. 1",
the Magazine "The Special No. 3"
The Magazine "The Special No. 4",
the Magazine "Sumpin Different",
and the Magazine "Pleasure Partners,
Volume 1, Number 1",

PETITIONERS,

versus

THE STATE OF ALABAMA,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF FOR RESPONDENT IN OPPOSITION

WILLIAM G. BAXLEY
Attorney General of Alabama

CHARLES H. BARNES
Assistant Attorney General
of Alabama
250 Administrative Building
Montgomery, Alabama 36104

Attorneys for Respondent

INDEX

	Page
Question presented	1
Argument	2
Conclusion	7
Certificate of Service	8
Appendix A	9

CASES CITED

	Page
City of Chicago v. Kimmel, 201 NE 2d 382	3
Gable v. Jenkins, 309 F. Supp. 998 (N.D. Ga. 1969) aff'd 397 U.S. 592, 90 S. Ct. 1351, 25 L. Ed. 2d 595	2
Ginsburg v. U. S., 383 U.S. 463, 86 S. Ct. 942 16 L. Ed. 2d 31	4
Jones v. City of Birmingham, 45 Ala. App. 86, 224 So. 2d 922, Cert. den. 284 Ala. 731, 224 So. 2d 924, U. S. Cert. den. 396 U. S. 1011	3, 6
Kahn v. U. S., 300 F. 2d 78 (5CCA) Cert. den. 369 U. S. 859, 82 S. Ct. 949, 8 L. Ed. 2d 78	3, 4
Levin v. Maryland, 1 Md. App. 139, 228 A. 2d 487, Cert. den. 389 U. S. 1048, 88 S. Ct. 767	4
Memoirs v. Massachusetts, 383 U. S. 413, 86 S. Ct. 975, 16 L. Ed. 2d 1	2
Milky Way Productions v. Leary, 305 F. Supp. 288 (S.D. N.Y. 1969), aff'd *New York Feed Co. v. Leary* 397 U. S. 98, 90 S. Ct. 817, 25 L. Ed. 2d 78 (1970)	2
Roth v. U. S., 354 U. S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498	2
Smith v. California, 361 U.S. 147, 80 S. Ct. 215, 4 L. Ed. 2d 205	3
U. S. v. Oakley, 290 F. 2d 517, Cert. den. 369 U. S. 859, 82 S. Ct. 949, 8 L. Ed. 2d 18	4
U. S. v. Padell, 262 F 2d 357, Cert. den. 359 U. S. 942, 79 S. Ct. 723, 3 L. Ed. 2d 676	4
U. S. v. Reidel, 402 U. S. ....., 91 S. Ct. 1410, 28 L. Ed. 2d 813 (1971)	2
U. S. v. Wild, 422 F 2d 34 (2CCA)	4
Volanski v. U. S., 246, F. 2d 842, 5 A.L.R. 3d at pg. 1191 S. 15 (b)	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1052

CHESTER McKINNEY, Ind. and d/b/a
PARIS BOOKSTALL,
and the Magazine "Blast Off Number 1",
the Magazine "Beavers, Vol. 4, No. 1",
the Magazine "The Special No. 3"
The Magazine "The Special No. 4",
the Magazine "Sumpin Different",
and the Magazine "Pleasure Partners,
Volume 1, Number 1",

PETITIONERS.

versus

THE STATE OF ALABAMA,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

WHETHER BOTH THE TRIAL COURT AND THE HIGHEST STATE APPELLATE COURT CAN MAKE A DETERMINATION OF OBSCENITY VEL NON USING ONLY THE ROTH-MEMOIRS STANDARDS, UPON PRESENTATION OF THE MATERIAL ACCOMPANIED BY AFFIDAVITS, WHICH ALL ARE PART OF THE RECORD

ON REVIEW: AND WHERE THE PETITIONER DID NOT DENY THE OPEN AND WILLING SALE OF THE MATERIAL OR OFFER, OR ATTEMPT TO OFFER, ANY AFFIRMATIVE EVIDENCE AS TO THE OBSCENITY OR NON-OBSCENITY OF THE MATERIAL?

ARGUMENT

Petitioner spends considerable time in brief attempting to show that the standards to be utilized in the determination of obscenity extend beyond those tests propounded by this Honorable Court in *Roth v. U. S.* 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1998 and carried forward and expanded upon in *Memoirs v. Massachusetts* 383 U.S. 413, 86 S. Ct. 975, 16 L. Ed. 2d 1. This test now commonly recognized as the *Roth-Memoirs* test is that material is obscene if: (a) the dominant theme of the material taken as a whole appeals to the prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards; and (c) the material is utterly without redeeming social value.

The Alabama Supreme Court in this case (Appendix A) has demonstrated quite clearly that this Honorable Court has not extended the obscenity test to allow the commercial sale or distribution of obscene materials, so long as there is no pandering, sale to minors or invasion of privacy. This is shown by this Honorable Court's affirmances in *Milky Way Productions v. Leary* 305 F. Supp. 288 (S.D. N.Y. 1969) aff'd *New York Feed Company v. Leary* 397 U.S. 98, 90 S. Ct. 817, 25 L. Ed. 2d 78 (1970); *Gable v. Jenkins* 309 F. Supp. 998, *(N.D. Ga. 1969)*, aff'd 397, U.S. 592, 90 S. Ct. 1351, 25 L. Ed. 2d 595, and in *U. S. v. Reidel,* 402 U.S. ....., 91 S. Ct. 1410, 28 L. Ed. 2d 813 where this Honorable Court

again renewed its adherence to *Roth* while continuing to limit its holding in *Stanley*.

Petitioner in brief has attempted to show that both the trial court and the Alabama Supreme Court should not be allowed to make a determination of obscenity because of the failure of the State of Alabama to present a *prima facie* case. This contention was argued extensively by Petitioner in briefs in the trial court and the Alabama Supreme Court and was met head-on by the Alabama Supreme Court and rightfully rejected.

Various State and Federal courts have met the issue of the sufficiency of the evidence in a determination of obscenity. The Fifth Circuit Court of Appeals in *Kahn v. U. S.* 300 F. 2d 78 (5CCA) Cert. den. 369 U.S. 859, 82 S. Ct. 949, 8 L. Ed. 2d 78 and the Illinois Supreme Court in *City of Chicago v. Kimmel* 201 NE 2d 382, to city only two courts, have held that the trier of fact is fully capable of determining whether material is obscene by applying the proper standards. The Fifth U. S. Circuit Court of Appeals in the *Kahn* case supra, the Alabama Court of Appeals in *Jones v. City of Birmingham* 45 Ala. App. 86, 224 So. 2d 922, Cert. den. 284 Ala. 731, 224 So. 2d 924, U.S. Cert. den. 396 U.S. 1011, and this honorable court in *Smith v. California* 361 U. S. 147, 80 S. Ct. 215, 4 L. Ed. 2d 205 have all held or inferred that the trier of fact is the embodiment of the community and is cognizant of the standards of the community relating to acceptance of obscenity.

Petitioner's contention has been refuted even stronger by courts that have held or inferred that introduction of the material presents a question for the judge and it is not necessary to call witnesses to testify or give expert opinions,

as to whether the material introduced is obscene based on contemporary community standards. Some of the decisions where state and federal courts have ruled on this point are as follows: *Kahn v. U. S.* supra; *U. S. v. Wild* 422 F 2d 34 (2 CCA); *U. S. v. Padell* 262 F 2d 357, Cert. den. 359 U. S. 942, 79 S. Ct. 723, 3 L. Ed. 2d 676; *Ginsburg v. U. S.* 383 U.S. 463, 86 S. Ct. 942 16 L. Ed. 2d 31; *U. S. v. Oakley* 290 F. 2d 517, Cert. den. 369 U. S. 859, 82 S. Ct. 949, 8 L. Ed. 2d 18; *Volanski v. U. S.* 246 F. 2d 842, 5 A.L.R. 3d at page 1191 S. 15(b); *Levin v. Maryland* 1 Md. App. 139, 228 A. 2d 487, Cert. den. 389 U. S. 1048, 88 S. Ct. 767.

A study of the record shows that the State of Alabama, in the trial court, introduced six magazines, supported by three affidavits per magazine, from citizens in different walks of life. One was an engineer, one an attorney, and one was a building contractor. All of these affidavits stated that the magazines were obscene. The State offered testimony showing nude men and women exposing themselves in lewd positions, implying sexual conduct. Petitioners, in this action, offered no affirmative evidence and neither party offered expert testimony. Petitioner made no offer to introduce any evidence.

Upon introduction of the State's evidence, the trial judge had before him more than adequate evidence to allow him to make a legal and constitutional determination of obscenity. As stated previously, when the magazines were introduced, a question for the judge arose and the existence or non-existence of witnesses or expert testimony has no bearing on the *ability* of the trial court to make a determination of obscenity based on contemporary community standards; *Kahn, Wild, Padell, Volanski, Levin* et. al cases supra.

The trial court and the Alabama Supreme Court had before them the magazines. The Alabama Supreme Court

spoke of these magazines, which were a part of the record, as silent witnesses and the fact that their open and willing sale was not denied enabled this highest Alabama Court to pass upon the obscenity, vel non, of the magazines. The Alabama Supreme Court not only affirmed the trial court's determination of obscenity but, also, went further and made an independent determination itself that the magazines were obscene.

A close examination of the six concerned magazines show them to be obscene *per se*. The magazine, "Sumpin Different," implies or suggests acts of fellatio; Pages 6, 14, 18; cunnilingus, Pages 4, 7, 11, 12, 24 sexual intercourse, Pages 3, 6, 8, 10, 14, 24, 25, 26, 27; buggery, Pages 5, 8, 22, 24. The remainder of the magazine in filled with pictures emphasizing the exposed genital areas of men and women with the type of clothes that only emphasize sex. The magazine, "The Special No. 3" has obsolutely no writing even to page numbers or publisher's name. It is generously supplied with pictures implying, or suggesting, sexual intercourse, buggery, fellatio, cunnilingus, lesbianism, and other sexually perversive acts. The magazine, "The Special No. 4" also has no writing or page numbers except the title and page after page implies acts of sexual intercourse, buggery, fellatio, cunnilingus and sexually perversive acts. The magazine, "Pleasure Partners" also has no page numbers and its pages are filled with implied or suggested acts of lesbianism, sadism, cunnilingus, sexual intercourse, fellatio and other acts of perversion. The magazine, "Blast Off" shows numerous implied acts of perversion and sexual intercourse sprinkled generously with pictures emphasizing by various methods the completely exposed genital areas of men and women in lewd and suggestive poses. The magazine, "Beavers" besides having numerous pictures of completely exposed men and

women in the previously mentioned lewd and sexually provocative positions also has a short story that is obscene to the extreme.

The previously described various acts of sexual perversion could only appeal to the prurient interest in sex. Certainly pictures suggesting or implying those various acts, which in many cases are in violation of Alabama law, completely affront contemporary community standards, and if there is any redeeming social value, I am at a loss to see it. The trial court, and the Alabama Supreme Court, obviously also found no redeeming social value.

Petitioner cites several cases where various magazines or books were held not to be obscene but as the Federal Courts have stated many times each publication must stand on its own. Those courts had other publications before them. They did not have these magazines. If this Honorable Court actually had before them the publications that were the subject of the cases cited by Petitioner then they might be able to make a comparison with the magazines at hand, but many words describing a picture will not necessarily depict the meaning of that picture to another. The word description of a picture is only the opinion of one person of what a picture portrays. This should in no way be binding on another publication with different pictures and poses. The Alabama Court of Appeals in *Jones v. City of Birmingham*, 45 Ala. App. 86, 224 So. 2d 922, Cert. den. 284 Ala. 731, 224 So. 2d 924, U. S. Cert. den. 396 U. S. 1011 stated that where evidence which is before the trial court does not come to the reviewing court the sufficiency of the evidence is not within the scope of appellate review. This holding could be used as an analogy to demonstrate that cases ruling on publications not readily available to this Honorable Court could not be

used as a "yardstick" in making a determination of obscenity on the respondent magazines in this case. One other point, I am sure this Court has noticed is that at least two of the magazines don't even have a publisher listed. Could it be that the publisher is afraid of being prosecuted?

CONCLUSION

The trial court decreed that the magazines were obscene. The Alabama Supreme Court, after examining the evidence, including the magazines, also made an independent determination that the magazines were obscene. It is respectfully submitted that the petition for Writ of Certiorari be denied.

Respectfully submitted,

WILLIAM G. BAXLEY
Attorney General of Alabama

CHARLES H. BARNES
Assistant Attorney General
of Alabama

250 Administrative Building
Montgomery, Alabama 36104

Attorneys for Respondent

CERTIFICATE OF SERVICE

I, Charles H. Barnes, one of the attorneys for the Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 17 day of March, 1972, the requisite number of copies of the foregoing Brief for Respondent in Opposition were mailed by first class mail, postage prepaid, to each of the following attorneys of record for the Petitioners in the case.

D. Freeman Hutton
Suite 2005
1175 Peachtree Street, N. E.
Atlanta, Georgia 30309

Robert Eugene Smith
Suite 507
102 W. Pennsylvania Avenue
Towson, Maryland 21204

Ferris S. Ritchey
825 Frank Nelson Building
Birmingham, Alabama 35203

Charles H. Barnes

CHARLES H. BARNES
Assistant Attorney General
of Alabama

APPENDIX A

THE STATE OF ALABAMA — JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1971-72

Chester McKinney, Ind. and d/b/a Paris Bookstall
And the Magaizne, "Blast Off Number 1"
the Magazine "Beavers, Vol. 4, No. 1"
the Magazine "The Special No. 3"
the Magazine "The Special No. 4"
the Magazine "Sumpin Different"
the Magazine "Pleasure Partners, Volume 1, Number 1"

6 Div. 806 - 811

v.

STATE OF ALABAMA

Appeal from Jefferson Circuit Court, in Equity

PER CURIAM

Chester McKinney owned and operated an "Adults Only" book store on 5th Avenue, North, in Birmingham, Alabama. The windows of the store were painted so that the items offered for sale were not visible except to those who entered the store. It does not appear that there was any type of

promotion or advertising to stimulate the sales of the book store or any sales to minors.

On March 9, 1970, one D .H. Johnson, Chief Investigator for the Attorney General's Office of the State of Alabama, visited the book store as an investigator of pornography and purchased six magazines which were openly offered for sale. The magazines he purchased were sealed with cellophane covers so that they could not be picked up and thumbed through. The front and back covers, however, were clearly visible through the cellophane covers and in one or more of these covers were the photographs of a female with her feet spread-eagled apart, exposing her genital organs. On the basis of the sale and purchases of these magazines the Assistant Attorney General in the State of Alabama filed bills of complaint against each magazine in the equity side of the Circuit Court of Jefferson County praying that the magazines be adjudicated obscene and that a temporary injunction be issued against their further exhibition or sale in this State. Together with the bill of complaint was an affidavit from the Assistant Attorney General alleging that in his opinion the purchased magazines were obscene. The magazines themselves were attached as exhibits to the bills. The respondent demurred to the complaint raising constitutional questions and upon the demurrers being overruled he filed an answer denying that the magazines were constitutionally obscene and a cross-bill seeking an injunction restraining further interference with the operation of the business. The bills were filed pursuant to the provisions of Alabama Law on Obscenity which appears as Chapter 64 of Title 14 in the pocket part of the 1958 Recompiled Code of Alabama.

Paragraph 7 of each of the complaints charged as follows:

"7. Complainants represent unto your Honors that said magazine is obscene in that its dominant theme throughout appeals only to the prurient interest in sex, in that it is patently offensive because it affronts contemporary community standards relating to the representation of sexual matters and because said magazine is utterly without redeeming social value or importance; and, further, said magazine is obscene because it is or was, at the time of its possession by the respondents aforesaid, being pandered for the sole purpose of the commercial exploitation of sex. The sole function of said magazine is the presentation of photographs of nude persons in lewd and lascivious poses calculated to expose to unhampered view the genital organs of said persons and exhibited only to arouse the prurient interest of the reader in sex."

The cases were consolidated for trial.

Only one witness testified for the complainant. He merely testified to the purchase of the magazines in question from the book store and as to its location and the fact that it had the quotation "Adults Only" on the sign both inside and outside the store and as to the other facts set forth above.

The respondent called as his only witness the Assistant Attorney General who had instituted the proceedings. He was examined by the complainant as to his legal knowledge of the various opinions of the courts on the matter concerning the subject of obscenity. For what purpose this examination was conducted, we do not speculate.

No further evidence was offered by either party, thereupon the court entered the following decree:

"FINAL DECREE

"This cause came on to be heard and was submitted upon pleading and proof as noted on June 23, 1970.

"This cause was filed under Title 14, Section 374 (3) of the Code of Alabama of 1940 as recompiled and amended.

"The party Complainant is properly styled under the provisions of Chapter 64-A of said Title 14 and the party Respondents are properly named thereunder. The prayer for relief in the original Bill of Complaint prays for an adjudication by the Court that the magazine, the subject of this action, contains matter that is obscene, for a permanent injunction against the preparing, selling, exhibiting, commercially distributing, giving away or offering to give away or possessing it with the intent to sell and commercially distribute or exhibit or offer to give it away, and for its surrender, seizure and destruction.

"The Cross-Bill of the Respondent, Chester McKinney, prays for a ruling by the Court that the matter contained in the said magazine is not obscene, and further prays that the Court will enjoin the Complainant-Cross-Respondent from enforcing the said Statute upon which the Bill of Complaint is founded and from instituting any new civil or criminal proceedings against Respondent-Cross-Complainant.

"The Court must found its adjudication of obscenity, vel non, upon the prescribed definition contained in the said Section 374(3) as follows:

"'Obscene' means lewd, lascivious, filthy and pornographic and that to the average person, applying contemporary community standards, its dominant theme taken as a whole appeals to prurient interest." The Court finds that

the publication complained against comes within the definition of 'printed or written matter or material' as set forth in said subsection.

"Applying the above definition of the word 'obscene' to the printed or written material or matter complained against the Court finds that it is obscene. The Court gives weight and credence to the testimony of the witnesses for Complainant relative to the question of the obscenity of the said material; and, further, this Court has been, for the past 61 years a member of the society making up the community of Birmingham in Jefferson County, Alabama and, as such, is aware of the contemporary community standards, in said community, relative to the question of whether printed or written matter or material is obscene, within the meaning of the said Statute.

"The question of the obscenity, vel non, of the said magazine is the portal question in this cause, and having been by the Court decided it is CONSIDERED, ORDERED, ADJUDGED AND DECREED as follows:

"ONE: That certain magazine or publication described in the Bill of Complaint as 'Blast Off Number 1' is declared to be 'obscene' within the meaning of the word as set forth in Title 14, Section 374(3) 1940, Code of Alabama as recompiled and amended.

"TWO: The said magazine is declared to be contraband.

"THREE: The Sheriff of Jefferson County is hereby ordered to seize and destroy all copies of the said magazine in the possession of the Respondent, Chester McKinney, individually and doing business as Paris Bookstall.

"FOUR: The respondents are permanently enjoined from preparing, selling, exhibiting or giving away, or offering

to give away or possession with the intent to sell, commercially distribute, exhibit, give away or offer to give away any copy of the said magazine.

"FIVE: The relief prayed by Respondent, Chester McKinney, individually and doing business as Paris Bookstall, is denied and the said Cross-Complaint is dismissed.

"SIX: The costs of this action are taxed to the Respondent, Chester McKinney, individually and doing business as Paris Bookstall, for which let execution issue.

"DONE and ORDERED this the 30th day of June, 1970.

"Wm. C. Barber
CIRCUIT JUDGE IN EQUITY SITTING"

Similar decrees were entered as to the other five magazines.

Amidst the sea of words and the shifting sands of legal writing as to what constitutes obscenity not subject to sale and distribution to adults one can well be led away from solid ground. The appellant refers again and again in his brief to the magazines as "girlie" magazines. A more apt description would be "genital" magazines. No claim is made or proof offered that they were of any artistic merit or other than lewd in general content or had any appeal other than prurient. Even a cursory examination reveals their wholly pornographic nature from which pollutants of the mind is all that could emanate.

We are not unaware that the burden of proof of obscenity was on the complainants and that the oral proof was scant but the silent witnesses, that is the magazines themselves, which are a part of the record under review and the fact that

their open and willing sale by the respondent is not denied suffices to enable us to pass upon the obscenity, vel non, of the magazines. From viewing them we are persuaded that in them we find a coalescence of the following elements:

(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

We find ourselves in full accord with the holding of the Supreme Court of Florida in the recent case of May v. Harper, 250 So. 2d 880, from which we quote:

"As their first point on appeal, appellants contend that by virtue of Redrup v. New York, 386 U.S. 767, 87 S. Ct. 1414, 18 L. Ed. 2d 515 (1967), and the summary reversals based thereon, together with Stanley v. Georgia 394 U.S. 557, 89 S. Ct. 1243, 22 L. Ed 2d 542 (1969), they may engage in the commercial sale and distribution of obscene materials so long as there is no pandering, sale to minors, or an invasion of the privacy of others by their method of operation. Appellants are clearly in error. The United States Supreme Court's affirmances of Milky Way Productions, Inc. v. Leary, 305 F.Supp. 288 (S.D. N.Y. 1969), aff'd New York Feed Co. v. Leary, 397 U.S. 98, 90 S. Ct. 817, 25 L.Ed.2d 78 (1970), and Gable v. Jenkins, 309 F.Supp. 998 (N.D. Ga. 1969), aff'd 397 U.S. 592, 90 S. Ct. 1351, 25 L. Ed.2d 595 (both of which were decided subsequent to Redrup and Stanley), were affirmances of cases specifically holding that no additional tests for obscenity are required beyond the Roth-Memoirs standards. Shortly after appellants' brief was filed in this Court, the United States Supreme Court announced in United

States v. Reidel, 402 U.S. 91 S. Ct. 1410, 28 L. Ed.2d 813 (1971), that the Court was renewing its adherence to Roth and sharply limiting its prior holding in Stanley."

We therefore, affirm the decrees appealed from but in doing so observe and find that the obscenity, vel non, of the magazines in question offends not only the local morals of Jefferson County, Alabama, but are offensive both to contemporary standards in Jefferson County and across the country.

AFFIRMED.

Heflin, C.J., Coleman, Bloodworth, Maddox, and McCall, J.J., concur.